No. 92-515

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

STATE OF WISCONSIN,
Petitioner,

v.

TODD MITCHELL,
Respondent.

On Writ of Certiorari to the Supreme Court of Wisconsin

AMICUS CURIAE BRIEF OF THE WISCONSIN FREEDOM OF INFORMATION COUNCIL IN SUPPORT OF THE RESPONDENT

LINDA M. CLIFFORD
JEFFREY J. KASSEL *
LAFOLLETTE & SINYKIN
Suite 500
One East Main Street
P.O. Box 2719
Madison, WI 53701-2719
(608) 257-3911
Attorneys for the amicus curiae, Wisconsin Freedom of Information Council
* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

23 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-515

STATE OF WISCONSIN,
Petitioner,

v.

TODD MITCHELL,
Respondent.

On Writ of Certiorari to the Supreme Court of Wisconsin

AMICUS CURIAE BRIEF OF THE WISCONSIN FREEDOM OF INFORMATION COUNCIL IN SUPPORT OF THE RESPONDENT

INTEREST OF THE AMICUS CURIAE

The Wisconsin Freedom of Information Council submits this brief as amicus curiae in support of the respondent, Todd Mitchell.[1]

The Wisconsin Freedom of Information Council ("FOIC") is a 24-member association representing the Wisconsin electronic and print media and the public. Devoted to the protection of the First Amendment, the FOIC monitors and speaks out against governmental actions that threaten the First Amendment freedoms of its members and the public. The FOIC believes that all

---

[1] The amicus curiae has filed with the clerk letters from counsel for both parties documenting their consent to the submission of this brief.

branches of government and, especially, the courts must be vigilant against any encroachment on First Amendment guarantees of free speech, thought, expression and association.

Penalty enhancement legislation, no matter how well-motivated, collides with the First Amendment. The Wisconsin Supreme Court's invalidation of § 939.645[2] was

[2] Wis. Stat. § 939.645 has been amended, but most of its amendments are not at issue on this appeal. At the time of Todd Mitchell's conviction, § 939.645, Wis. Stats. (1989), read as follows:

(1) If a person does all of the following, the penalties for the underlying crime are increased as provided in sub. (2):

(a) Commits a crime under chs. 939 to 948.

(b) Intentionally selects the person against whom the crime under par. (a) is committed or selects the property which is damaged or otherwise affected by the crime under par. (a) because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property.

(2) (a) If the crime committed under sub. (1) is ordinarily a misdemeanor other than a Class A misdemeanor, the revised maximum fine is $10,000 and the revised maximum period of imprisonment is one year in the county jail.

(b) If the crime committed under sub. (1) is ordinarily a Class A misdemeanor, the penalty increase under this section changes the status of the crime to a felony and the revised maximum fine is $10,000 and the revised maximum period of imprisonment is 2 years.

(c) If the crime committed under sub. (1) is a felony, the maximum fine prescribed by law for the crime may be increased by not more than $5,000 and the maximum period of imprisonment prescribed by law for the crime may be increased by not more than 5 years.

(3) This section provides for the enhancement of the penalties applicable for the underlying crime. The court shall direct that the trier of fact find a special verdict as to all of the issues specified in sub. (1).

(4) This section does not apply to any crime if proof of race, religion, color, disability, sexual orientation, national origin or ancestry is required for a conviction for that crime.

With § 939.645, the Wisconsin legislature also enacted § 943.012, forbidding criminal damage to religious and other property, and

courageous jurisprudence that properly recognized the statute's insidious erosion of First Amendment values. *State v. Mitchell*, 169 Wis.2d 153, 485 N.W.2d 807 (1992). With this brief, the FOIC urges affirmance of that decision and asks that this Court, too, exercise the vigilance necessary to protect cherished principles from a well-intentioned but misguided effort to cure an admittedly odious social problem.

SUMMARY OF ARGUMENT

Hate crimes are repugnant to a free society. However, any effort to reduce or eliminate hate crimes through penalty enhancement statutes, though well-meaning, is misguided. Enactment of penalty enhancement statutes punishes constitutionally-protected viewpoints which, though socially unpopular and disfavored, are constitutionally protected. Government punishment of biased opinion is the first step toward thought control.

The government's attitude toward viewpoints, even those based on hatred of social and political groups, must remain neutral under the First Amendment. This statute is not neutral because it regulates viewpoints about certain subjects but not others.

The statute before the Court is overbroad. The statute penalizes protected thought and, because of the way it is enforced, constrains the exercise of protected speech and association by using evidence of the defendant's expression, speech and association to somehow prove intentional selection of the victim.

Even if the statute were deemed to regulate conduct rather than speech, it must be strictly scrutinized because it affects First Amendment interests and because the

§ 895.75, creating a private right of action to recover special and general damages as well as emotional distress and punitive damages caused by hate crimes. *See* 1987 Wis. Act 348.

government's interest in enforcing the regulation is related to the suppression of constitutionally-protected thoughts and ideas. The statute is not narrowly tailored to the government's goal of eradicating hate crimes because sufficient means are available to prevent and punish hate crimes without sacrificing First Amendment protections.

ARGUMENT

The proliferation of hate crimes is repugnant to most people. Society should try—and does try—to foster tolerance and harmony among its many groups. Indeed, the fundamental mission to "form a more perfect union, establish justice, insure domestic tranquility . . . promote the general welfare, and secure the blessings of liberty to ourselves and posterity" demands that the country persevere in that endeavor. *See* U.S. Const., preamble.

The pressure to "do something" to eliminate hate crimes is strong. Yet, what government chooses to do in the interest of peace, harmony, and the protection of its citizenry cannot trammel upon equally valuable constitutional protections that are as important to the nation's long-term general welfare and liberty.

This debate is fundamental because it pits one constitutional goal—the eradication of discrimination embodied in the Thirteenth, Fourteenth and Fifteenth Amendments—against another—the guarantee of free thought and expression embodied in the First Amendment.

Hate crimes legislation sacrifices the First Amendment —the source of freedom from which all other liberties flow—to current societal pressures. It represents the first step in the perilous journey toward thought control and punishment of beliefs and ideas in violation of the First Amendment and overbreadth principles.[3]

---

[3] The statute also is flawed on vagueness and equal protection grounds, but the FOIC leaves those arguments to the respondent.

I. WISCONSIN'S HATE CRIMES STATUTE VIOLATES THE FIRST AMENDMENT'S PROHIBITION AGAINST PUNISHING THOUGHT.

A. Characterizing The Statute As A Regulation Of Conduct Is Not The End Of The Analysis.

The State argues that because § 939.645 merely regulates conduct, its First Amendment implications are minimal. Br. of Pet. at 38; *see also Mitchell*, 485 N.W.2d at 821-22 (Bablitch, J., dissenting). While governmental regulation of conduct is permissible where that regulation incidentally affects First Amendment interests, *United States v. O'Brien*, 391 U.S. 367, 376 (1968), regulation of conduct is not permissible where the regulation affects First Amendment interests *and* the government's interest in regulation is related to the suppression of expression. *Texas v. Johnson*, 491 U.S. 397, 403 (1989).

Thus, characterizing the penalty enhancer as merely the regulation of conduct does not save it. The Court must take the next step in the analysis and determine whether the government's principal interest in enforcing § 939.645 is in suppressing thought or beliefs. Since the government's only interest in enforcing § 939.645 is to suppress animus in connection with certain groups, the statute, when strictly scrutinized, must fall. *Id.* at 412.

B. The First Amendment Prohibits Punishment Or Control Of Thought.

The First Amendment's guarantee of free speech is silent on the status of free thought. Recognizing that freedom of speech is meaningless without freedom of thought, however, this Court has made it clear that free speech presupposes freedom of thought. Freedom of speech cannot be limited to the spoken word; it necessarily includes freedom to think, to believe, to disagree. *See Wooley v. Maynard*, 430 U.S. 705, 714-15 (1977) (First Amendment prohibits punishment for concealing license plate state motto from view because of conflict with re-

ligious beliefs); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974) ("[T]here is no such thing as a false idea."); *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) ("Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (First Amendment forbids forced recitation of the pledge of allegiance).

> [A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State.

Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234-35 (1977) (public school teacher cannot be required to pay union dues to advance causes he does not believe in).

Thus, while the United States Constitution and federal statutes require the government to eliminate racism, for example, from its own "speech" and conduct, *see, e.g.*, Fourteenth Amendment; 18 U.S.C. § 242, it cannot cleanse racist thoughts from the minds of its citizens even in furtherance of its own legitimate goal of eradicating racism. It cannot order or control thought in compliance with governmental objectives.

> Bigotry and hatred in the fields of race and religion reflect a mental attitude which does not necessarily become translated into human behavior. Great honor is almost universally paid to that special commandment "that ye love one another." But no means has yet been found or attempted to compel this highly commendable viewpoint by law. Obviously to do so would border very closely on thought control, which is resisted (even to the extent of permitting bigotry and intolerance) by every legal precept we know.

City of Cincinnati v. Black, 8 Ohio App. 2d 143, 146-47, 220 N.E.2d 821, 824 (1966).

Punishing hate appears morally attractive because we are socialized in that direction. Government sanctions will be only as "moral," however, as the government in power.

> Totalitarian governments today rule much of the planet, practicing suppression of billions and spreading dogma that may enslave others. One of the things that separates our society from theirs is our absolute right to propagate opinions that the government finds wrong or even hateful . . . . "Above all else, the First Amendment means that government has no power to restrict expression because of its message [or] its ideas . . . ."

American Booksellers, Inc. v. Hudnut, 771 F.2d 323, 328 (7th Cir. 1985), *aff'd Hudnut v. American Booksellers Ass'n*, 475 U.S. 1001 (1986), *reh. denied*, 475 U.S. 1132 (1986) (citations omitted). The First Amendment protects citizens from the tyranny of the good- as well as the bad-thinking powers-that-be by requiring that government, in all cases, remain neutral regarding its criminalization of thought.

> [F]rom a governmental perspective . . . there can be no such things as "good" and "bad" speech or "right" and "wrong" ideas. If a structure of speech protection permits government to make such judgments, then the only real question is "Who is in power?"
>
> . . . .
>
> Our society's commitment to free speech . . . rejects the notion that those in power can regulate expression on the basis of their assessment of right and wrong. Rather, our system is premised on [a] "veil of ignorance." Rules of behavior are established without knowing who will have power and who will not. Under this "bet-hedging" model, we have chosen not to allow those in power to employ their personal substantive moral judgments as a basis for determining the protection of free speech.

Martin Redish, *Freedom of Thought as Freedom of Expression: Hate Crime Sentencing Enhancement and First Amendment Theory*, 11 Crim. Just. Ethics 29, 33 (1992) ("Redish"). Yet, the Wisconsin penalty enhancement statute attempts to do just that, to let those in power impose their moral viewpoint, to control "bad" thought by punishing "bad" thought.

In *Stanley*, this Court invalidated a state statute making it a crime to possess obscene literature in one's home.

> [I]n the face of . . . traditional notions of individual liberty, [the state] asserts the right to protect the individual's mind from the effects of obscenity. We are not certain that this argument amounts to anything more than the assertion that the State has the right to control the moral content of a person's thoughts. To some, this may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment.

Id. at 565-66 (footnotes omitted).

Punishment of thought is an Orwellian nightmare. Penalty enhancement legislation opens the door to the investigation and criminalization of motivation, ideas, and sentiments, whatever their stripe.

C. The Statute, Which Is Not Limited to Violent Crimes, Enhances The Punishment Of Those Who Hate Certain Groups But Not Those Who Hate Unprotected Groups Or Don't "Hate" At All.

The Wisconsin statute criminalizes a defendant's thoughts and ideas by enhancing his or her penalty based on animus toward or criticism of the protected groups.[4] To foster state-approved thoughts of harmony among members of different social groups, the state identifies criminals who don't share those thoughts and punishes them more severely.

[4] It must be assumed that the punished viewpoint is hatred, bigotry or similar animus. *See Mitchell*, 485 N.W.2d at 812-13. To assume otherwise only accentuates the statute's vagueness, for it is not easy to envision the punishment of criminal conduct motivated by love or goodwill.

The danger in the penalty enhancement scheme is compelling. Statutes enhancing penalties for crimes committed "because of" racial or religious bigotry, gay-bashing, or ethnic tension, for example, cannot be distinguished conceptually from statutes enhancing penalties for crimes committed "because of" other political or social viewpoints, for example, political party affiliation.

This Court has invalidated the notion that government can carve out and regulate only some kinds of viewpoint speech. The state cannot isolate only a few categories of disfavored thought and criminalize them. "The government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government," *R.A.V. v. City of St. Paul*, —— U.S. ——, 112 S.Ct. 2538, 2543 (1992) (emphasis in original), because this amounts to content-based regulation, which violates the First Amendment. *Id.* at 2542-43; *see also New York v. Ferber*, 458 U.S. 747, 763 (1982); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. ——, 112 S.Ct. 501 (1991); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

The *R.A.V.* Court struck down a Minnesota anti-cross-burning statute on this basis because it applied only to "fighting words" that insulted or provoked "on the basis of race, color, creed, religion or gender."

> Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use "fighting words" in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered. The First Amendment does not permit St. Paul to impose

> special prohibitions on those speakers who express views on disfavored subjects.

R.A.V., 112 S.Ct. at 2547.

If one analogizes the hateful motives that trigger § 939.645 to "fighting words," then, under *R.A.V.*, the statute is invalid. Section 939.645 criminalizes bias toward certain groups and not others, an inherently content- and viewpoint-based regulation. Justice Scalia, writing for the Court in *R.A.V.*, applied this principle to "fighting words"—a category of speech generally proscribable. No less protection should be afforded § 939.645 because it also affects political thought entitled to the fullest protection.

This thought control statute paves the way for regulation of other thoughts. If § 939.645 is constitutional, then so are these, for now, hypothetical statutes:

- You serve more time if you select your crime victim—a Republican—because of her political views, with motive being evidenced, for example, by your membership in the Democratic Party.
- You serve more time if you select your crime victim—an evolutionist—because of his scientific views, with motive being evidenced, for example, by your membership in a creationist organization.
- You serve more time if you select your crime victim—an abortion foe—because of her privacy views with motive being evidenced by your participation in a pro-choice rally.
- You serve more time if you select your crime victim—a capitalist—because of his economic views, with motive being evidenced, for example, by your attendance at a Marxist rally.

While hate crimes are a deplorable facet of modern society, the Court should consider the constitutional risk of addressing the problem by creating a new one—the erosion of First Amendment prohibitions against viewpoint discrimination. Criminalization of certain viewpoints undercuts the principles that foster fearless, full and robust debate and expression about all viewpoints—including the disgusting and the unpopular.

> If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.

Texas v. Johnson, 491 U.S. at 414; *see also* R.A.V., 112 S.Ct. at 2568 (Steven, J., dissenting) ("Viewpoint discrimination is censorship in its purest form").

II. WISCONSIN'S HATE CRIMES STATUTE IS UNCONSTITUTIONALLY BROAD BECAUSE IT PUNISHES PROTECTED THOUGHT AND INHIBITS PROTECTED SPEECH AND ASSOCIATION.

A. The Statute Punishes Private Thoughts And Ideas That Are Fully Protected By The First Amendment.

A statute is void for overbreadth when it sweeps protected expression and association within its ambit and has a substantial chilling effect on the exercise of protected expression. *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940); *see Gooding v. Wilson*, 405 U.S. 518, 521 (1972); *Lewis v. City of New Orleans*, 415 U.S. 130, 134 (1974).

Speech is accorded a hierarchy of protections. *Compare* protection of obscenity, libel, and fighting words, *with* protection of political speech. Thought, on the other hand, knows no such hierarchy. Any theory short of full protection of all thoughts and ideas is inimical to basic constitutional ideals. Thus, the penalty enhancement statute is fundamentally overbroad in that *everything* within its sweep—biased thought—is protected by the First Amendment and not subject to regulation or punishment.

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. at 642.

Commission of an underlying crime is punishable by the state in the exercise of its police power. At the same time, the First Amendment forbids punishment of speech or thought, even bigoted speech or thought. Combining criminal conduct with protected speech does not protect the mixture from punishment—commission of theft, for example, when motivated by bias or prejudice, is not in its totality expressive conduct protected by the First Amendment. But when the underlying crime of theft, whether or not motivated by bias or prejudice, is already punishable by the state, then any additional punishment imposed because of biased motive is an unconstitutional penalty on thought. *See generally*, Susan Gellman, *Sticks and Stones Can Put You In Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. Rev. 333, 358-79 (1991).

B. The Introduction Of Evidence of the Defendant's Speech And Association To Prove Why The Victim Was Selected Will Constrain the Exercise Of Free Speech And Association.

The way the penalty enhancer must be enforced chills the exercise of free speech and association and renders it unconstitutional. This is because, in practice, the likely means of proving selection of a victim because of race or religion, for example, will be the examination of the defendant's speech and association to demonstrate private beliefs in those subject areas. The statute requires

the government to "invade the sanctity of the individual's private social and political attitudes." *Redish* at 30.

The majority below correctly points out that speech uttered before or during commission of the crime may be introduced to show that the defendant held racist views and that those views motivated selection of the victim.[5]

The rules of evidence do not prohibit introduction of past speech and association or even post-crime speech and association to prove motive, *i.e.*, why the victim was selected. *See* F.R. Evid. 404(b), 801(d)(2); Wis. Stats. §§ 904.04(2) and 908.01(4)(b). Evidence of bias against a group might range from vulgar ethnic jokes to association in supremacy groups, from writings critical of affirmative action to membership in an anti-apartheid organization. *See also, supra*, p. 10.

While admitting this invasion into protected speech and association activities, the State simply disregards its First Amendment implications. *Mitchell*, 485 N.W.2d at 815; Br. of Pet. at 44. The State misunderstands the distinc-

---

[5] The dissent incorrectly assumed that there is a "tight nexus" between selection of the victim and the underlying crime because circumstantial evidence would not be admissible to show victim selection.

> To prove intentional selection of the victim, the state cannot use evidence that the defendant has bigoted beliefs or has made bigoted statements unrelated to the particular crime. Evidence of a person's traits or beliefs would not be permissible for the purpose of proving the person acted in conformity therewith on a particular occasion. The statute requires the state to show evidence of bigotry relating directly to the defendant's intentional selection of this particular victim upon whom to commit the charged crime. The state must directly link the defendant's bigotry to the invidiously discriminatory selection of the victim and to the commission of the underlying crime.

Mitchell, 485 N.W.2d at 818-19 (Abrahamson, J., dissenting). This conclusion is curious in light of the State's admission that such speech could be used as circumstantial evidence to prove the defendant's selection of the victim. *Id.* at 815.

tion between using speech and association evidence as proof of the underlying crime and using it as proof of bias to support a finding that a victim was selected because of membership in a class.

Certainly speech can be used as evidence of a crime. "I hate that son of a bitch and I'm going to kill him" is admissible to prove that a defendant committed murder. "I hate that nigger and I'm going to kill him" is similarly admissible to prove that the defendant murdered an African-American. But using that same evidence, perhaps combined with evidence of membership in the KKK, to prove *and additionally punish* the same defendant's selection of that victim because of his race is to use speech and association to punish him only for his bigoted beliefs.

The practical result of § 939.645 is the punishment of the defendant's speech and associations, irrespective of the underlying crime. The statute sweeps protected speech and association into its ambit and punishes it. It is thus unconstitutionally broad.

One of the statute's many defects is its application to virtually every crime codified by the State of Wisconsin. Section 939.645 is not just an ethnic intimidation statute. It enhances penalties not only for violent crimes but also for crimes involving speech and assembly and economic and business activities. It takes little imagination to hypothesize the penalty enhancer's inhibiting effect on political speech and association when it covers such a range of criminal conduct.

Bosnian-Americans desiring to protest Serbian atrocities, for example, will be chilled from speaking or expressing their convictions knowing that a confrontation with Serbian-Americans could lead not only to a disorderly conduct charge (a Class B misdemeanor under Wis. Stat. § 947.01, 90 days) but also an enhanced penalty (up to one year) for their outrage.

A penalty enhancement very well could chill economic speech, particularly in large urban areas that feature

a variety of ethnic communities. For example, in a dispute between a minority community and landlords or retailers who overcharge or simply are rude the standoff might follow ethnic lines (*e.g.*, African-American v. Korean-American; hispanic v. white) as much as the economic lines reflecting the different economic status of the groups involved. What may start as the victimized neighborhood's threat to injure a business (a Class D felony under § 943.30, up to five years) or a threat to communicate derogatory information (a Class E felony under § 943.31, up to two years) could escalate to an ethnic or racial crime against the landlord or retailer "selected" "because of" his race or national origin.

Economic protest—through the threat of derogatory information or a boycott against price gouging—may be the economic minority's only effective response to mistreatment. Yet, such acts could be punished under § 939.645 as a hate crime evidenced by the utterance of an ethnic slur or a history of vitriolic neighbor squabbles. That prospect is not unlikely to chill the very essence of political and economic thought in a free society.

Further examples of chilling effects are apparent in the broad reach of the statute. Section 946.40, for example, makes it a crime to refuse to aid an officer. Section 939.645 enhances the penalty where an African-American's refusal is predicated on a belief that a police department is racist. Again, penalty enhancement would penalize such protest.

Most alarming is the application of the penalty enhancer to already criminalized "speech crimes." For example, it works to enhance the penalty for criminal defamation, Wis. Stats. § 947.01, and, as such, directly affects press freedom.[6]

---

[6] The statute's application to libel renders it absolutely unconstitutional under the majority's viewpoint discrimination analysis in

The news media devote enormous energy to accuracy in reporting. Nothwithstanding those efforts, circumstances may expose some journalists to liability for criminal defamation. Their freedom to communicate ideas is limited not only by defamation law but, under § 939.645, by any underlying point of view. Section 939.645 will chill news coverage, editorials, scholarly publications, and activist literature and speech about protected persons or groups if journalists must fear being criminally charged as a bigot for publishing stories on race relations, ethnic strife, gay bashing, religious cultism, Nazism, or euthanasia, for example.

Based on the great potential for constraining public debate, this Court has struck down a law that told the news media what it had to publish. It also should strike down a statute that limits the media's freedom to publish or broadcast what they want.

> Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the . . . statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the . . . statute, political and electoral coverage would be blunted or reduced. Government-enforced right of access inescapably "dampens the vigor and limits the variety of public debate . . . ."

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (newspaper could not be required to publish opposing views of political candidates).

Section 939.645 presents the possibility of an enhanced penalty for vigorous coverage of or editorializing about controversial or sensitive social or political issues. It presents the chilling possibility of a jury drawing an inference of bias from close scrutiny of prior news cover-

---

R.A.V. *See supra* p. 10. Here, the State has exercised content discrimination by punishing some libels more than others. 112 S.Ct. at 2538.

age and editorials. This specter might well cause editors to "conclude that the safe course is to avoid controversy." *Id.*

The State gratuitously suggests that to prevent a chilling effect on speech: "do not commit a crime!" Br. of Pet. at 44. Even if this patronizing advice fits violent crime prevention, it ignores the law's broad applicability to many nonviolent crimes which, by definition, involve expressive conduct or speech entitled to the First Amendment's full protection.

III. PENALTY ENHANCERS ARE NOT NECESSARY TO ACHIEVE THE STATE'S GOAL OF ERADICATING HATE CRIMES.

Supporters of hate crimes laws are convinced that hate crimes are an especially invidious threat to society, particularly because of their *in terrorem* effect on the community. This elevated threat, they contend, offsets the need to apply the exacting scrutiny that the First Amendment ordinarily requires. Alternatively, they argue that even a statute that regulates expression can be saved if the resulting discrimination is narrowly tailored to serve compelling state interests.

As the *R.A.V.* court concluded, however, "the 'danger of censorship' presented by a facially content-based statute . . . requires that that weapon be employed only where it is '*necessary* to serve the asserted interest'." 112 S.Ct. at 2549 (emphasis in original) (citations omitted).

Beyond their constitutional defects, hate crimes laws are unnecessary and counterproductive to achieving the state's legitimate interest in eliminating hate crimes.[7]

---

[7] It generally is for the legislative branch, not the judicial, to determine the wisdom of legislation. It is, therefore, beyond the scope of the Court's mission to ponder long on whether penalty enhancement is "good" public policy. Even those who believe such laws constitutional, however, find them contrary to good public policy.

> Enhancing punishment for racially motivated crimes seems to me to be part of a larger American syndrome of adopting harsh

Laws already exist that permit full and vigorous punishment of the conduct that intimidates and harms members of society, including members of protected groups, unprotected groups, minorities, and the majority who are reviled by minority groups.

While the First Amendment prohibits governmental sanction of bigoted thought, it does not make society defenseless against hate crimes. Government is able to punish underlying crime perpetrated by bigots—but without regard to their bigotry.

The criminal code provides "sufficient means" to prevent hate crimes without sacrificing the First Amendment. *R.A.V.*, 112 S.Ct. at 2550; *see also Texas v. Johnson*, 491 U.S. at 410 (need not punish flag desecration to keep the peace); *State v. Wyant*, 169 Ohio St. 3d 566, 579 597 N.E.2d 450, 459 (1992) ("Conduct motivated by racial or religious bigotry can be constitutionally punished under the criminal code without resort to constructing a thought crime.")

Government can best demonstrate its commitment to fostering harmony, promoting the general welfare, and protecting intimidated and terrorized groups by punishing rather than ignoring already prohibited conduct perpetrated against those groups. Penalty enhancement statutes represent a poor strategy against the pernicious effects of hatred, intolerance, ignorance, and incivility. A better strategy—the one advanced by this Court—is to let "the competition of other ideas" help correct the "per-

---

punishment as an expedient response that deals only with the most superficial manifestations of complex, deep-seated problems. Moreover, hate crime laws promise to be difficult to administer, may well be counterproductive in that they might be used disproportionately against the very minority groups they were primarily designed to protect, and to some limited extent may even deter protected speech.

James Weinstein, *First Amendment Challenges to Hate Crime Legislation: Where's the Speech?* 11 Crim. Just. Ethics 6, 17 (1992).

nicious" ones. *Gertz*, 418 U.S. at 339-40. Preventing the clash between First Amendment and social policy goals, this strategy leaves each of us free to think and believe what we will.

CONCLUSION

The Wisconsin Freedom of Information Council urges the Court to affirm the decision below invalidating Wis. Stats. § 939.645 (1989-90).

Respectfully submitted,

LINDA M. CLIFFORD
JEFFREY J. KASSEL *
LAFOLLETTE & SINYKIN
Suite 500
One East Main Street
P.O. Box 2719
Madison, WI 53701-2719
(608) 257-3911
Attorneys for the amicus curiae, Wisconsin Freedom of Information Council

* Counsel of Record